SUPREME COURT OF THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

and

MOTION TO DEFER CONSIDERATION OF PETITION

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. .....

PEABODY COAL COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND MOTION TO DEFER CONSIDERATION OF PETITION.

Peabody Coal Company prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Seventh Circuit entered in the above case on December 2, 1960, and the decree of said Court rendered on April 5, 1961.

OPINIONS BELOW.

The opinion of the Court of Appeals entered on December 2, 1960, is reported at 284 F. 2d 810 and is attached as Appendix A. The order of the Court of Appeals entered on December 2, 1960, is attached as Appendix B. The order of the Court of Appeals denying a petition for rehearing entered on January 17, 1961, is attached as Appendix C. The final decree of the Court of Appeals entered on April 5, 1961, which was not published is attached as Appendix D. A certified record in said case, together with the proceedings in the Court of Appeals for the Seventh Circuit is furnished herewith.

JURISDICTION.

The opinion and order of the Court of Appeals were entered on December 2, 1960, and the final decree of the Court was entered on April 5, 1961. The Respondent has filed a petition for clarification or modification of the opinion of December 2, 1960. The Court of Appeals has not acted on said petition. On March 1, 1961, the time for filing petition for writ of certiorari by the Petitioner herein was extended by order of this Court to May 1, 1961.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 10 (e) of the Labor Management Relations Act of 1947, as amended.

QUESTIONS PRESENTED.

The questions presented for review are:

1. Whether an order of the Court of Appeals restraining an employer from "in any other manner interfering

with, restraining or coercing employees" in the exercise of rights guaranteed under the Labor Management Relations Act of 1947, as amended, is too broad.

2. Whether an order of the Court of Appeals requiring an employer to cease and desist from encouraging membership in a certain named union, or in any other labor organization, by discriminating in regard to hire or tenure of employment, or any term or condition of employment, is too broad, in view of the reference to "any other labor organization" and in view of the finding of the Court that there was no discrimination in regard to hire or tenure of employment.

3. Whether the furnishing of a list of names of its employees by an employer to a union engaged in a campaign to supplant an incumbent union as bargaining representative of the employees, constitutes unlawful assistance to the aspiring union under the Labor Management Relations Act of 1947, as amended, where the incumbent union already had such information.

STATUTES INVOLVED.

The statutory provisions which are relevant to decision of this case, and the pertinent text of which is set forth in Appendix E, are Sections 7, 8 and 10 of the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U. S. C. A., Secs. 157, 158 and 160.

STATEMENT.

This petition seeks to review the final decree of the Court of Appeals which was rendered upon separate petitions of Peabody Coal Company (the "Petitioner") and the United Mine Workers of America, its District 12, and its Locals 1227 and 1229 (hereinafter collectively referred

to as "UMW") to review and set aside, and a cross petition of the National Labor Relations Board (the "Board") to enforce, a decision and order of the Board.

The incidents out of which this case arose had their inception in May, 1956 when the Petitioner, Peabody Coal Company (Peabody), acting through a subsidiary, acquired control of two coal mines in St. Clair County, Illinois (J. A. 8-9, 199-200).* At this time, these two mines were being operated under Progressive Mine Workers of America (Progressive) labor union contracts (J. A. 9, 204). Peabody also operated about 27 other mines under contracts with the United Mine Workers of America, including the National Bituminous Coal Wage Agreement of 1950, as amended (J. A. 9, 18-19, 55, 699-717).

In about June of 1957, the UMW commenced an active campaign to organize the employees of the O'Fallon and Millstadt mines (J. A. 685-687, 693-695). The unfair labor practice charges and complaints arose out of the ensuing conflict between UMW and Progressive during this organizing campaign.

As aptly expressed by the Court of Appeals, "Fundamentally, this is a struggle between the Progressive Mine Workers of America (Progressive) and the United Mine Workers of America (UMW) with the employer, Peabody, being more or less in the middle" (App. A, p. 2).**

On about October 2, 1957, Peabody, through a process of merger and liquidation of its subsidiaries, acquired direct ownership of the two mines, and therefore is now the only employer involved in this case. Upon presentation of UMW membership cards signed by almost 100% of the

* References to "J. A." are to the Joint Appendix which is a part of the certified record of the proceedings in the Court of Appeals.

** References to "App." are to the appropriate Appendix incorporated in this petition.

miners at the two mines, Peabody recognized the UMW as exclusive bargaining representative of the employees at the two mines; and entered into a collective bargaining agreement with the UMW covering the employees (J. A. 554).

Thereupon, Progressive officials filed charges of unfair labor practices against Peabody and UMW, and the General Counsel of the Board filed two separate complaints against Peabody and the UMW, which were later consolidated into one case. A hearing was held before a Board Trial Examiner at St. Louis, Missouri, in October, 1958. The Trial Examiner found that Peabody (and UMW) had engaged in conduct violative of Section 8 (a) (1), (2), (3) and (5) of the Labor Management Relations Act of 1947, as amended, and made recommendations which in his opinion would remedy the alleged unfair labor practices (J. A. 44-49).

Upon a hearing before the Board, the Board in its decision and order dated December 30, 1959, substantially adopted the Trial Examiner's conclusions and recommendations (J. A. 57-62).

Upon petitions of Peabody and UMW to review and set aside, and upon the cross petition of the Board, the Court of Appeals, in its opinion rendered December 2, 1960, and its order entered on the same date, modified the order of the Board, and directed that as modified the order was to be enforced. On April 5, 1961, the Court of Appeals issued its final decree which in substance required that Petitioner cease and desist from (1) giving effect to the collective bargaining agreement entered into between Petitioner and the UMW; (2) recognizing UMW as the representative of its employees at the O'Fallon and Millstadt mines of Petitioner unless and until UMW shall have demonstrated its exclusive majority representative status pursuant to an election to be conducted by the Board as early as possible under applicable rules, regulations and prac-

tices, it being understood that Peabody need not bargain with any union until the Board has certified the results of the election; (3) assisting and contributing support to UMW, or to any other labor organization; (4) encouraging membership in UMW or in any other labor organization of its employees by discriminating in regard to hire or tenure of employment, or any term or condition of employment; and (5) in any other manner, interfering with, restraining or coercing employees in the exercise of the right to self organization.

Further, the Court of Appeals directed the Petitioner to take the following affirmative action: (1) withdraw and withhold all recognition from UMW for the purpose of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment or other conditions of employment, unless and until said labor organization shall have demonstrated its exclusive majority representative status pursuant to a Board conducted election; (2) make whole employees at the two mines involved for any loss of earnings they may have suffered by reason of a discriminatory lockout; and (3) preserve necessary records and post appropriate notices.

It is upon the final decree of the Court of Appeals entered on April 5, 1961, that this petition for writ of certiorari is based.

REASONS FOR GRANTING THE WRIT.

1. The decree of the Court of Appeals entered on April 5, 1961, contains provisions in the cease and desist portion of the order which have been held to be too broad by other Courts of Appeal, and which appear to be in conflict with the holdings of this Court with respect to similar provisions.

The decree of the Court of Appeals issued on April 5, 1961, requires that Petitioner, cease and desist from, among

other things, "in any other manner interfering with, restraining or coercing employees" in the exercise of their rights under the Labor Management Relations Act of 1947, as amended (App. D, p. 19).

This Court, in the case of **Communications Workers of America v. National Labor Relations Board**, 362 U. S. 479 (1960), has held that the use of the words "or any other employer" in a cease and desist order against a union was unwarranted, and ordered the words stricken from the order. In this case, the Court notes that the Court of Appeals for the Sixth Circuit had already required the words "in any manner" to be deleted from the order.

The Ninth Circuit Court of Appeals, in the case of **Morrison-Knudsen Company v. National Labor Relations Board**, 276 F. 2d 63, 76 (1960), also ordered stricken the portion of a Board order which incorporated the words "in any other manner restraining or coercing employees."

The Third Circuit Court of Appeals, citing the **Communications Workers** case of this Court, required the words "or any other labor organization" and "or by discriminating in any other manner in respect to hire . . ." to be deleted from the proposed order of the Board. **National Labor Relations Board v. U. S. Steel Corporation et al.**, 278 F. 2d 896, 903 (1960).

2. The April 5, 1961, decree of the Court of Appeals also requires that Petitioner cease and desist from encouraging membership in a named labor organization, "or in any other labor organization of its employees, by discriminating in regard to hire or tenure of employment . . ." (App. D, p. 19).

The use of the phrase "or in any other labor organization" would fall in the class of phrases discussed above which are too broad.

Furthermore, the Court of Appeals, in its opinion of December 2, 1960, stated:

> "No employee of either of the coal mines . . . complained of any coercion or discriminatory conduct" (App. A, p. 2).
>
> "Furthermore, in the transition from Progressive to UMW, no employee at either mine lost his job. Membership in UMW was not a condition of employment. An employee did not need to belong to UMW to retain his employment" (App. A, p. 8).
>
> "In the instant case, no employee did lose his job in the change-over to UMW" (App. A, pp. 11-12).

It is submitted, therefore, that the order of the Court of Appeals is too broad in its references to "any other labor organization" and to "discriminating in regard to hire or tenure of employment."

3. Throughout the various hearings in this case, before the Trial Examiner, before the Board and before the Court of Appeals, there has arisen considerable confusion concerning the status of federal law with the respect to the effect of an employer's furnishing a list of its employees to one of two contending labor organizations.

As the trial examiner stated in his intermediate report, there was "small question of fact" as to the furnishing of such a list by Peabody to UMW during the organizing conflict with Progressive. The trial examiner further said, "Although there is no evidence that Progressive made a similar request, since this labor organization exclusively represented both mines it is reasonable to suppose that it already possessed such a list." The trial examiner concluded as follows:

> "It appears reasonable to conclude that the furnishing of these lists to White was in the nature of

assistance by the employer to United [UMW], since these officials had fore knowledge—or belief as to their use by United [UMW]. It appears somewhat short of reasonable, however, in the opinion of the Trial Examiner to hold, as General Counsel alleges in the complaint and urges in his brief, that such 'assistance', *per se*, was 'unlawful'.

"The Trial Examiner considers that **Morganton Full Fashioned Hosiery Company** (107 NLRB 1535), cited by United [UMW] in its brief, contains the governing conclusion. There the Board declined to set aside an election on the ground that a list of employees had been furnished to one labor organization and not to another, under circumstances essentially similar to those existing here. The Board said:

> "In view of the absence of any request by the Union for a mailing list or any valid excuse for the Union's failure to request such list from the Employer, we find no improper assistance to the Petitioner or interference with the election as the result of the incident hereinabove mentioned.

"The Trial Examiner concludes and finds, therefore, that the furnishing of the above-described lists did not, *per se*, constitute unlawful assistance to United [UMW] and interference within the meaning of the Act as alleged by the Complaint. The **fact** of assistance, however, as a detail in the larger picture of events described below, may well have bearing upon other issues" (J. A. 14-15).

The Board, in its decision, reconsidered this finding of the trial examiner, and concluded as follows:

"1. The Trial Examiner found that the furnishing of a mailing list of employees by Peabody to UMW was in the nature of employer assistance to UMW

but not *per se* unlawful. Without passing on the matter of whether the conduct was *per se* unlawful, we agree with the Trial Examiner's conclusion, for the record shows, as detailed in the Intermediate Report, that Peabody assisted UMW by numerous other acts. In this context we find that furnishing a mailing list to UMW constituted unlawful assistance in violation of Section 8 (a) (2) of the Act." (Citing **Wagner Iron Works**, 104 NLRB 445, 447, in a footnote.) (J. A. 54.)

When the issue of the effect of furnishing the lists was raised in the instant case before the Court of Appeals it was decided as follows:

> "We think the furnishing of the lists by itself would be no basis for the conclusion of the Board. Even considered with other acts of assistance, it is a slender reed on which the Board, in part, vests its decision. Although of relative small importance in the case, we are not disposed to interfere with the Board's decision as to the effect of furnishing lists" (App. A, pp. 6-7).

The Board itself, in two other cases, **Morganton Full Fashioned Hosiery Co.**, 107 NLRB 1534, and **The DeVilbiss Co.**, 115 NLRB 1164, held that the furnishing of a list to one of two contending labor organizations in a representation case was not unlawful assistance. In the **Morganton** case, which was cited with approval in the DeVilbiss case, the Board said that it could not agree with the hearing officer's holding that the employer's furnishing of a list to one of the two contending labor organizations without notifying the other that it had given such list comprised undue assistance. The Board then proceeded: "Absent either a request by the Union for that list or a showing that such a request would have been futile, it cannot be found that the Employer gave undue or improper assistance to the Petitioner."

The case of **Wagner Iron Works**, 104 NLRB 445, 447, cited by the Board as authority for its holding in the case at bar, is obtuse on the question of the effect of furnishing a list. In the **Wagner** case the trial examiner found that the employer's furnishing a mailing list of employees to an AFL union, one of two contending unions, was evidence, together with other acts, of domination. The Board, however, merely held that it did not agree with the trial examiner's finding of domination, but held that there was unlawful assistance, without indicating whether or not the grounds were the same as those cited by the trial examiner as the basis for his holding of domination.

In any event, the **Wagner** case preceded both the **Morganton** and **DeVilbiss** cases, which appear to be the most recent expressions of the Board on the subject until the case at bar.

Although the Court of Appeals indicated that it felt the issue was "of relative small importance" in the instant case, it is submitted that this is a question which affects a great number of employers and labor unions and should be settled by this Court.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for certiorari be granted, subject to the motion to defer consideration which follows.

MOTION TO DEFER CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI.

Petitioner moves the Court to defer consideration of the foregoing Petition for a Writ of Certiorari, and in support of such motion shows as follows:

The Respondent has filed with the Court of Appeals a Petition for Clarification or Modification of the opinion of

the Court rendered December 2, 1960, which has not been ruled upon by the Court. Petitioner understands that Respondent may file a petition for writ of certiorari in this case, and Petitioner believes that consideration of its petition should be deferred until it is determined whether or not Respondent will file a petition in order that all of the issues in this case may be before the Court at one time.

Respectfully submitted,

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